



AFI/SFK  
DM-10/2003

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
Re: Appeal to the Board of Patent Appeals and Interferences

Inventor/Applicant of: Roberto Carlos Perez

Group Art Unit: 3761

Serial No.: 10/696,181

Examiner: Kidwell, Michele M.

Filed: October 29, 2003

Our Customer ID: 22827

For: COVER LAYER FOR AN ABSORBENT ARTICLE

Our Account No.: 04-1403

Sir:

Attorney Ref.: KCX-1235 (19508)

1. ☐ **NOTICE OF APPEAL:** Pursuant to 37 CFR 41.31, Applicant hereby appeals to the Board of Appeals from the decision dated 2/12/2007 of the Examiner twice/finally rejecting claims 27-41.
2. ☒ **BRIEF** on appeal in this application pursuant to 37 CFR 41.37 is transmitted herewith (1 copy)
3. ☐ An **ORAL HEARING** is respectfully requested under 37 CFR 41.47 (due within two months after Examiner's Answer).
4. ☐ Reply Brief under 37 CFR 41.41(b) is transmitted herewith (1 copy).
5. ☐ "Small entity" verified statement filed: ☐ herewith ☐ previously.
6. **FEE CALCULATION:**

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☐ Fee NOT required since paid in prior appeal in which the Board of Appeals did not render a decision on the merits.

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**DORITY & MANNING, ATTORNEYS AT LAW, P.A.**

By: TIM F. WILLIAMS Reg. No.: 47,178  
Signature: [Signature]  
Date: 10/11/2007

I hereby certify that this correspondence is being deposited with the United States Postal Service as first class mail in an envelope addressed to: Commissioner for Patents, U.S. Patent and Trademark Office, Post Office Box 1450, Alexandria, VA 22313-1450, on October 11, 2007.

**DARLENE G. PARKER**

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[Signature]  
(Signature of person mailing paper or fee)



**PATENT**

**ATTORNEY DOCKET NO.: KCX-1235(19508)**

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

In re Application:	)	
Roberto Carlos Perez et al.	)	Examiner: Kidwell, Michele M.
	)	
Serial No.: 10/696,181	)	Group Art Unit: 3761
	)	
Filed: October 29, 2003	)	Dep. Acct. No.: 04-1403
	)	
Title: Cover Layer for An Absorbent Article	)	Conf. No.: 6535

Mailstop Appeal Brief - Patents  
Honorable Commissioner for Patents  
U.S. Patent and Trademark Office  
P.O. Box 1450  
Alexandria, VA 22313-1450

**BRIEF ON APPEAL**

Honorable Commissioner:

Appellants submit the following brief on appeal in accordance with 37 C.F.R. §

41.37:

**1. REAL PARTY IN INTEREST**

The real party in interest in this matter is the assignee of record, Kimberly-Clark  
Worldwide, Inc.

**2. RELATED APPEALS AND INTERFERENCES**

There are no other appeals or interferences known to the Appellants or the Appellants' legal representative which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

**3. STATUS OF CLAIMS**

Currently, claims 17-41 remain pending in the present application. Claims 1-16 were cancelled by Applicant. Claims 17-26 were withdrawn in response to a restriction requirement mailed April 5, 2006. By Final Office Action of February 12, 2007, and Advisory Action of May 8, 2007, claims 27-41 were finally rejected under 35 U.S.C. § 103(a).

The rejection of examined claims 27-41 is hereby appealed.<sup>1</sup>

**4. STATUS OF AMENDMENTS**

To the Appellant's knowledge, all amendments have been entered into the record.

**5. SUMMARY OF CLAIMED SUBJECT MATTER**

In general, the presently claimed subject matter is directed to an apertured top sheet or cover layer for an absorbent article having indicia imprinted thereon.<sup>2</sup> Illustrated in Fig. 2 of the present application, the cover layer has one or more apertures having an opening that tapers in a direction extending away from a user contacting

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<sup>1</sup> All the pending claims are attached hereto in the Claims Appendix.

<sup>2</sup> Page 1, lines 8-9; Page 2, lines 15-20; Page 4, lines 5-11; Fig. 1.

surface of the cover layer towards a non-user contacting surface of the cover layer.<sup>3</sup> As set forth in the present application, the cover layer may be used in the construction of an absorbent article having an absorbent layer located between a bottom layer and the cover layer.<sup>4</sup> The indicia printed onto the cover layer may include words or images.<sup>5</sup>

For example, independent claim 27 is directed to an absorbent article comprising a cover layer having a user contacting surface and a non-contacting surface, wherein the cover layer has indicia formed thereon and defines one or more apertures having an opening that tapers in a direction extending away from the user contacting surface towards the non-contacting surface.<sup>6</sup> The absorbent article also comprises a bottom layer and an absorbent layer disposed between the cover layer and the bottom layer.<sup>7</sup>

By way of further example, dependent claim 28 is further directed to a cover layer having indicia formed upon the non-contacting surface of the cover layer.

## **6. GROUND OF REJECTION TO BE REVIEWED ON APPEAL**

Claims 27-41 were rejected in the Final Office Action under 35 U.S.C. § 103(a) as being unpatentable over Ouellette et al. (U.S. Patent No. 5,431,643) and further in view of Raley (U.S. Patent No. 4,846,813).

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<sup>3</sup> Page 7, lines 5-9; Fig. 2.

<sup>4</sup> Page 4, lines 5-8.

<sup>5</sup> Page 4, lines 8-9; Page 9, lines 8-16.

<sup>6</sup> Page 7, lines 5-9; Fig. 2.

<sup>7</sup> Page 4, lines 5-8.

**7. ARGUMENT**

“[T]he examiner bears the initial burden, on review of the prior art or on any other ground, of presenting a prima facie case of unpatentability.” In re Oetiker, 977 F.2d 1443, 1445, 24 USPQ2d 1443, 1444 (Fed. Cir. 1992). In rejecting claims under 35 U.S.C. § 103, it is incumbent upon the Examiner to establish a factual basis to support the legal conclusion of obviousness. See In re Fine, 837 F.2d 1071, 1073, 5 USPQ2d 1596, 1598 (Fed. Cir. 1988). In so doing, the Examiner must make the factual determinations set forth in Graham v. John Deere Co., 383 U.S. 1, 17, 148 USPQ 459, 467 (1966). Furthermore, “‘there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness’. . . .” KSR Int’l Co. v. Teleflex Inc., 127 S. Ct. 1727, 82 USPQ2d 1385, 1396 (2007) (quoting In re Kahn, 441 F.3d 977, 988, 78 USPQ2d 1329, 1336 (Fed. Cir. 2006)).

The Supreme Court has stated that demonstrating each element of a patent was independently known in prior art does not prove the invention to be obvious. KSR Int’l Co., 127 S. Ct. at 1727, 82 U.S.P.Q.2d at 1385. Indeed many, if not all, inventions in some manner are combinations of what is already known; the elements being building blocks to reach the claimed inventions. Id. Accordingly, even if all elements of a claim are disclosed in various prior art references, the claimed invention taken as a whole cannot be said to be obvious without some reason given in the prior art why one of ordinary skill would have been prompted to modify the teachings of the references to

arrive at the claimed invention. See, e.g., In re Regel, 188 U.S.P.Q. 132 (C.C.P.A. 1975).

Attempting to recreate the present invention, the Final Office Action asserts that it would be obvious to modify the non-tapered aperture in the fluid pervious cover layer of Ouellette et al. with the tapered apertures of Raley's fluid impervious cover layer because such would provide a presumed advantage of "more effective acceptance and retention of liquids as taught by Raley in the abstract."<sup>8</sup> Applicants submit that the rejection of all pending claims on this basis is improper for at least the following reasons.

**A. There Is No Factual Basis for the Final Office Action's Presumption that an Advantage Would Result from a Modification of the Fluid Pervious Cover Layer of Ouellette et al.**

Ouellette et al. sets forth an absorbent article having a fluid pervious cover layer, a backsheet, and an absorbent core positioned between the cover layer and the backsheet.<sup>9</sup> Ouellette et al. expressly states that liquids (e.g., bodily fluids) deposited on the cover layer will travel through the fluid pervious cover layer to the absorbent article.<sup>10</sup> As also indicated in Ouellette et al., its absorbent core readily accepts and

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<sup>8</sup> Final Office Action at p. 3.

<sup>9</sup> Col. 2, lines 36-39.

<sup>10</sup> Col. 2, lines 43-45.

retain liquids.<sup>11</sup> In fact, Ouellette et al. indicates that the capacity of its absorbent core can be absorbent enough to retain all fluid anticipated during use.<sup>12</sup> In short, Ouellette et al.'s cover layer works as intended and Ouellette et al. does not teach otherwise.

Nevertheless, in an effort to justify a purported advantageous modification of Ouellette et al.'s cover layer to include tapered apertures, the Final Office Action presumes a problem with Ouellette et al.'s absorbent article: An absorbent article that needs "more effective acceptance and retention of liquids." However, Ouellette et al. clearly indicates that no such problem exists with its absorbent article. Ouellette et al.'s absorbent article already effectively accepts and retains liquids and one of ordinary skill in the art would find no teaching otherwise in Ouellette et al. As such, the Final Office Action's basis for modifying the apertures in the cover layer of Ouellette et al. with the tapered aperture's of Raley simply has no factual basis in the prior art as required by Graham v. John Deere Co. Accordingly, Applicants' respectfully submit that the rejection is improper and each of the presently pending claims should be allowed to issue.

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<sup>11</sup> Col. 6, lines 60-64 ("The absorbent core 32 provides the means for absorbing menstrual fluid and other bodily extrudates.").

<sup>12</sup> Id.

**B. None of the Prior Art Cited in the Final Office Action Teaches that Ouellette et al.'s Apertured, Fluid Pervious Cover Layer Would Be Improved by a Modification to Raley's Tapered Apertures.**

The Final Office Action states that Raley's Abstract teaches that "apertures with tapered openings will allow for more effective acceptance and retention of fluids."<sup>13</sup> Accordingly, assuming that Ouellette et al. has the problem improperly presumed by the Final Office Action, the issue is whether Ouellette et al.'s absorbent article would receive a "more effective acceptance and retention of fluids" by having its apertured cover layer modified to a cover layer that has tapered apertures.

Ouellette et al. teaches that its cover layer is apertured, fluid pervious, and effectively passes fluid that is then retained by an absorbent core.<sup>14</sup> Raley indicates a fluid impervious cover layer with apertures that are tapered along the direction of fluid flow towards the absorbent core.<sup>15</sup> Because Raley's cover layer is fluid impervious, fluid reaches the absorbent core by "surface tensionally" entering the tapered apertures.<sup>16</sup> Raley indicates that tapering the apertures in the fluid impervious cover layer allows for such apertures to be collapsed (and thereby closed off) by the expansion of the absorbent core from fluid retention.<sup>17</sup>

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<sup>13</sup> Final Office Action at p.3

<sup>14</sup> See, e.g., Col. 2, lines 35-50.

<sup>15</sup> See Raley at Abstract and Fig. 2.

<sup>16</sup> See Raley at Abstract.

<sup>17</sup> See, Col. 6, lines 67 to Col. 7, line 15.



However, neither Raley's Abstract nor any other prior art cited by the Final Office Action describes how such tapering of the apertures of Ouellette et al.'s fluid pervious top sheet would provide "more effective acceptance and retention of fluids." For example, there is no teaching that providing tapered apertures would improve the acceptance of fluid into the absorbent article. Indeed, tapering the apertures along the direction of flow as shown by Raley would, if anything, appear to restrict the flow of fluid into an absorbent article. In addition, given that Ouellette et al. already has a fluid pervious cover layer, neither Raley's Abstract nor any other prior art cited by the Final Office Action explains how tapered apertures would (or could) provide "more effective acceptance and retention of fluids." Again, it is respectfully submitted that the Final Office Action's basis for modifying the apertures in the cover layer of Ouellette et al. with the tapered aperture's of Raley has no factual basis in the prior art as required by Graham v. John Deere Co. Accordingly, Applicants' respectfully submit that the rejection is improper and each of the presently pending claims should be allowed to issue.

**C. The Prior Art Cited in the Final Office Action Does Not Teach the Additional Limitations of Dependant Claim 28.**

Dependent claim 28 provides the additional limitation that the indicia are formed upon non-contacting surface of the cover layer. None of the references cited by the Final Office Action teach locating the indicia on the non-contacting

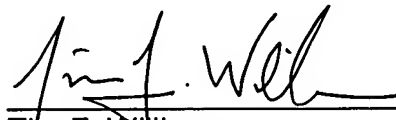
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surface nor does the Final Office Action otherwise indicate why the limitations in dependent claim 28 are obvious.

In conclusion, Appellants request favorable action and allowance of the presently pending claims.

Respectfully requested,

DORITY & MANNING, P.A.

A handwritten signature in black ink, appearing to read "Tim F. Williams", is written over a horizontal line.

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**8. CLAIMS APPENDIX**

1 - 16 (Cancelled)

17. (Withdrawn) A process for forming a cover layer of an absorbent article, comprising:

imprinting a user facing surface of a polymeric film with an ink to form indicia thereon;

forming apertures in the polymeric film, wherein the apertures form a protuberance having a tapered profile extending from the user facing surface to a bottom surface; and

treating the user facing surface with a surfactant and/or a botanical extract.

18. (Withdrawn) The process of Claim 17, wherein the polymeric film comprises a polyolefin.

19. (Withdrawn) The process of Claim 17, wherein forming apertures in the cover layer further comprises a vacuum aperturing process comprising:

heating a polymeric film to a softening temperature of less than about 400°C;

feeding the heated film onto a molding sheet, wherein the molding element comprises a plurality of perforations in fluid communication with a pump;

applying a vacuum between the molding element and the polymeric film causing portions of the polymeric film to flow into the plurality of perforations in the molding element to form the apertures; and

cooling the film.

20. (Withdrawn) The process of Claim 17, wherein the botanical extracts are selected from the group consisting of chamomile, aloe vera, jojoba, sunflower oil, citric

oils, carrot oil, avocado oil, almond oil, cotton extract, vitamin extracts, and a combination comprising at least one of the foregoing extracts

21. (Withdrawn) The process of Claim 17, wherein the surfactant is present in an amount of about 0.1 weight percent to about 3 weight percent of a total weight of the polymeric film, and the botanical extract is present in an amount of in about 0.01 weight percent to about 30 weight percent of a total weight of the polymeric film.

22. (Withdrawn) A feminine care product, comprising:

a cover layer containing a cover material and indicia imprinted thereon, wherein the indicia is formed from an ink comprising a surfactant and/or a botanical extract in an amount effective to increase the absorptive properties of bodily exudates into the cover layer as compared to the cover layer without the surfactant and/or botanical extract;

a liquid impervious bottom layer bonded to the cover layer; and

a sorbent core intermediate the cover layer and the bottom layer.

23. (Withdrawn) The feminine care product of Claim 22, further comprising the surfactant at an amount of about 0.1 to about 3 weight percent based on the total weight of the cover layer.

24. (Withdrawn) The feminine care product of Claim 22, further comprising the botanical comprises at an amount of about 0.01 to about 30 weight percent based on the total weight of the cover layer.

25. (Withdrawn) The feminine care product of Claim 22, wherein the surfactant is non-ionic.

26. (Withdrawn) The feminine care product of Claim 22, wherein the ink indicia comprises a particulate-type ink.

27. (Previously presented) An absorbent article, comprising:

a cover layer comprising a user contacting surface and a non-contacting surface, wherein said cover layer has indicia formed thereon, wherein said cover layer defines one or more apertures having an opening that tapers in a direction extending away from said user contacting surface towards said non-contacting surface;

a bottom layer; and

an absorbent layer disposed between said cover layer and said bottom layer.

28. (Previously presented) The absorbent article of claim 27, wherein said indicia are formed upon said non-contacting surface.

29. (Previously presented) The absorbent article of claim 27, wherein said indicia are formed upon said contacting surface.

30. (Previously presented) The absorbent article of claim 27, wherein said indicia comprises a surfactant, a botanical extract, or a combination thereof.

31. (Previously presented) The absorbent article of claim 27, wherein said one or more apertures are created by a method of vacuum aperturing.

32. (Previously presented) The absorbent article of claim 27, wherein said indicia comprises an ink and a surfactant.

33. (Previously presented) The absorbent article of claim 27, wherein said indicia comprises a color that contrasts with said cover layer so as to make said indicia visually apparent to a user of the absorbent article.

34. (Previously presented) The absorbent article of claim 27, wherein said indicia comprises an ink and a botanical extract.

35. (Previously presented) The absorbent article of claim 27, wherein said indicia comprises one or more surfactants, and wherein said surfactants are at about 0.1 weight percent to about 3 weight percent of a total weight of said cover layer.

36. (Previously presented) The absorbent article of claim 27, wherein said cover layer comprises a polyolefin.

37. (Previously presented) The absorbent article of claim 27, wherein said cover layer with said one or more apertures has an open area of about 5 percent to about 35 percent relative to the total area of said cover layer.

38. (Previously presented) The absorbent article of claim 27, wherein said indicia comprises a botanical extract, and said botanical extract is selected from the group consisting of chamomile, aloe vera, jojoba, sunflower oil, citric oils, carrot oil, avocado oil, almond oil, cotton extract, vitamin extracts, and a combination comprising at least one of the foregoing extracts.

39. (Previously presented) The absorbent article of claim 27, wherein said cover layer has been macroembossed.

40. (Previously presented) The absorbent article of claim 27, wherein said cover layer is bonded to an under layer comprising a material selected from the group consisting of a thermally carded web, thru air bonded web, spunlace material, apertured film, foam, and a combination comprising at least one of the foregoing materials.

41. (Previously presented) The absorbent article of claim 27, wherein said cover layer is bonded to an under layer that is treated with a surfactant, a botanical extract, or both.

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9. **EVIDENCE APPENDIX**

None

10. **RELATED PROCEEDINGS APPENDIX**

None